No. 14457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The complaint [R. 3] was filed pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. 903)[1] giving the District Court for the Southern District of California, in which appellant claimed to be a permanent resident [R. 3], jurisdiction over an action for a declaration that a person who has been denied a right or privilege as a national of the United States is a national of the United States.

This is an appeal from a judgment entered by the District Court [R 17-19] adjudging that appellant lost his

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[1]Preserved by the savings clause, section 405a of the Immigration and Nationality Act of 1952; note to 8 U. S. C. 1101.

United States citizenship by serving in the Japanese army and by voting in Japan [R. 18] and that therefore appellant was not entitled to rights or privileges of a national of the United States or to a passport to return to the United States.

This court has jurisdiction under the provisions of 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Facts.

Appellant was born in Hawaii on September 5, 1924 [R. 22]. He was thus by United States law (14th Amend.) and by Japanese law [R. 12; Ex. C], a citizen of both countries by birth. In 1933, at the age of 8, he was taken to Japan by his parents [R. 23], accompanied by an older brother, two younger sisters and a younger brother [R. 23]. Two other older brothers remained in Hawaii [R. 62]. Both parents and the older brother died in Japan [R. 37-38]. The two sisters are now living in the United States [R. 37]. The younger brother is in the United States Army [R. 37-38]. The purpose for which appellant was taken to Japan was to learn the Japanese language [R. 23]. The intention was that he was to finish grade school in Japan, take up an agriculture course and then return to the United States [R. 23].

The war broke out when appellant was 17 years of age [R. 3].

In December, 1944, appellant was drafted into the Japanese Army [R. 27-28, 43]. This was compulsory, pursuant to Japanese law, with criminal penalties provided in the event of violation [R. 35-36; Ex. 16, *Matsuye*

case].[2] The law of Japan on military service, in evidence in this case, is set out hereafter as Appendix "A." Appellant feared that if he refused to go into the army, he might be punished; he feared harm to his family with whom he was living [R. 27], and he feared the Military Police who were pretty much in charge of affairs in Japan at that time [R. 41]. Appellant was in the Japanese Army until the end of the war, and was sent back to Japan from China [R. 31] in 1946 [R. 33].

After the war, appellant voted in the occupation ordered elections of 1946, 1947 and 1948 [R. 33]. He did so because General MacArthur was the head man [R. 33], and the orders came from MacArthur's office that all should go to vote [R. 33]. Appellant feared loss of ration privileges if he did not vote and the second head man of the village told him that he must go and vote [R. 33]. Since the orders to vote came from General MacArthur's office, appellant feared for his status as an American if he did not obey them [R. 34].

The nature of and conditions in Japan at the times here involved are matters of which this and the lower court can take judicial notice. The documentary exhibits paint the picture. Extracts or summaries from some are set out below in Appendix "B."

In early 1949, appellant applied at the American Consulate in Japan for a passport to return to the United

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[2]Because of the number of cases of this nature before the District Court and the amount of exhibits ordinarily introduced, by stipulation of counsel and with the consent of the court, the bulk of the exhibits were introduced by reference to other cases wherein the exhibits themselves were introduced. The reference to the *Matsuye* case is to No. 1232 N. D. of the District Court below. By stipulation of counsel, copies of the actual exhibits are before this Court in this case.

States [R. 35]. This was refused and instead, the American Vice-Consul issued to appellant, a Certificate of the Loss of the Nationality of the United States [R. 35].

Hence the lawsuit.

Statutes Involved.

8 U. S. C. 801(c) and (e) provide in pertinent part:

> "A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by:
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> (e) Voting in a political election in a foreign state . . ."

Questions Involved.

1. Did the Government carry its burden, whether that burden be to show the expatriation of this American born citizen by clear, convincing, unambiguous evidence to have been voluntary, or whether its burden was to overcome the presumption that appellant's military service was involuntary by reason of his having been drafted into the Japenese Army pursuant to the compulsory Japanese Military Service Law? And, irrespective of what the Government's burden may be, was appellant's military service voluntary?

2. Assuming this court holds that appellant's military service was not voluntary and therefore that he did not lose his American Nationality by reason of that service, should this court decide the voting issue or should it remand the case to the District Court, as was done in *Perri v. Dulles,* 206 F. 2d 586 (C. A. 3, 1953), so that appel-

lant may take the oath prescribed by the Watkins Act (Public Law 515, 83d Cong.; 66 Stat. 240.)

3. If the court feels it should decide that issue, were appellant's acts of voting in Occupied Japan voluntary?

Specification of Errors.

1. The trial court erred in giving judgment for defendant.

2. The trial court erred in failing to adjudge that plaintiff is a national of the United States and did not lose that nationality by reason of his having served in the Japanese Army during World War II or by reason of his having voted in elections in Occupied Japan;

3. The trial court erred in admitting into evidence, over plaintiff's objections, Defendant's Exhibits "A," "C," and "D." Said exhibits were objected to on the grounds that they were hearsay, and that the witness testified as to the contents of the documents [R. 54, 81]. Exhibit "D" was additionally objected to on the ground that it was not voluntarily made [R. 66].

4. The trial court erred in finding that appellant's service in the Japanese Army was his free and voluntary act. Said finding [XV] is not supported by the evidence, and is clearly erroneous.

5. The trial court erred in finding the appellant's voting were his free and voluntary acts. Said finding [XVII] is not supported by evidence and is clearly erroneous.

6. The trial court erred in its conclusions IV, V and VI. 8 U. S. C. 802, upon which conclusion IV is predicated, has no application to involuntary military service. Conclusions V and VI are that appellant acted voluntarily as to both the army and election issues. This is contrary to the law on the subject.

ARGUMENT.

Summary of Argument.

1. There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Or, at the least, the Government's burden is to overcome the presumption that the citizen acted involuntarily. Since appellant was drafted into the Japanese Army pursuant to law, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption. And, in any event, on the ordinary burden of proof, appellant showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous.

2. Subsequent to the time judgment was entered in the within case, the 83d Congress passed Public Law 515, popularly known as "the Watkins Act" (66 Stat. 240). This Act provides a simple oath procedure to restore citizenship to those who purportedly lost it by reason of having voted in the elections held in Occupied Japan. If the court agrees that appellant did not lose his United States nationality by reason of his Japanese military service, the voting question need not be decided, but the case should be sent back to the District Court to permit appellant to take the oath of the Watkins Act.[3]

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[3]It is believed that counsel for appellee have no objection to this procedure.

4. If the court feels the procedure just suggested is not correct or feasible, then judgment should be for appellant on the ground that he voted involuntarily and that his case comes within this court's ruling in *Takehara v. Dulles,* 205 F. 2d 560.

I.

Appellee Did Not Meet the Burden Required of Him in Order to Take Away Appellant's United States Citizenship.

A. Preliminary Statement As to the Law of Expatriation, Generally.

This court has expressed itself, on a number of occasions on the general question of expatriation from United States citizenship. (See, *e. g., Acheson v. Murakami,* 176 F. 2d 953; *McGrath v. Abo,* 186 F. 2d 766; *Fukumoto v. Dulles,* 216 F. 2d 553; *Kawakita v. United States,* 190 F. 2d 506, aff'd 343 U. S. 717; *Takehara v. Dulles,* 205 F. 2d 560; *Attorney General v. Ricketts,* 165 F. 2d 193.) From these and other cases these principles emerge: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the clearest cases, the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the case in doubt. (*Cf., Perkins v. Elg,* 307 U. S. 325; *Dos Reis, ex rel. Camara v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947); *Podea v. Acheson,* 179 F. 2d 306 (C. A. 2d, 1950); *Schneiderman v. United States,* 320 U. S. 118, 125; *Baumgartner v. United States,* 332 U. S. 665, 670; *Mandoli v.*

Acheson, 344 U. S. 133, 193; *Acheson v. Maenza,* 202 F. 2d 453 (C. A. D. C., 1954); *Monaco v. Dulles,* 210 F. 2d 769 (C. A., 1954.)[4]

Accordingly, we turn to the law and facts applicable to this case.

B. Appellant's Service in the Japanese Army Was Involuntary.

In *Lehmann v. Acheson,* 206 F. 2d 592 (1953), 214 F. 2d 403 (1954), and *Perri v. Dulles,* 206 F. 2d 506 (1953), the Court of Appeals for the Third Circuit has done much to clarify the law. Understanding the nature of the problem (just as this Court did as to the Tule Lake situation in *McGrath v. Abo,* 186 F. 2d 766), the court said (206 F. 2d at 594) that:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . .
>
> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in

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[4]These concepts are especially important in view of the doubtful constitutionality of the statute altogether. (*Cf., United States v. Wong Kim Ark,* 169 U. S. 649, 703; *Dos Reis v. Nicolls,* 161 F. 2d 860; *Okimura v. Acheson,* 90 Fed. Supp. 587, 111 Fed. Supp. 303; *Murata v. Acheson,* 99 Fed. Supp. 591, 111 Fed. Supp. 306; *Terada v. Dulles,* 121 Fed. Supp. 6.) This whole question was briefed in *Hamamoto v. Acheson,* No. 13136, and *Dulles v. Furusho,* No. 13093 in this Court, both appeals dismissed by agreement of the parties, the first, because appellant restored his citizenship through the procedure of former 8 U. S. C. 717(c); the second, because even if the Government obtained a reversal, appellee would be entitled to the benefit of the Watkins Act.

the Swiss Army as a result of his conscription were involuntary."

The cases are of double importance because they reversed trial courts which had found for the government factually on the duress issue.

Accord:

Grensheimer v. Dulles, 117 Fed. Supp. 836 (D. C. D. N. J., 1954).

Furthermore, the court in *Lehmann* recognized, as did the court in *Okimura* and *Murata, supra,* footnote 4, that one does not lose his citizenship by complying with the laws of another state of which he also has nationality. Said the court (206 F. 2d at 597 and 598):

". . . As was stated in *Tomaya* (*sic*) *Kawakita v. United States, supra,* 343 U. S. at pages 723, 725, 72 S. Ct. at page 956, 96 L. Ed. 1249, 'The Concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries *and be subject to the responsibilities of both,*' and 'As we have said, dual citizenship presupposes rights of citizenship in each country. *It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the* maintenance of the other.'" (Emphasis supplied.)

"Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but

what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . ."

This concept in different language had previously been concurred in by the Attorney General in his opinion (41 Ops. Atty. Genl. No. 16), quoted from and approved by the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135. In another part of this opinion, the Attorney General said:

". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . ."

The court in *Lehmann* also went on to say (206 F. 2d at 598):

". . . (A)s we earlier stated conscription into a foreign army of one holding dual citizenship is sufficient to establish *prima facie* that the entry into and the service in that Army were involuntary. As already noted the Government failed in its obligation to rebut that presumption. Additionally, it may be noted that it has long been established that the burden of proving expatriation generally is upon the defendant who affirmatively alleges it and the burden is a 'heavy' one. *Bauer v. Clark* (7 Cir., 1947), 161 F. 2d 397, certiorari denied 332 U. S. 839, 68 S. Ct. 210, 92 L. Ed. 411, rehearing denied 332 U. S. 849, 68 S. Ct. 342, 92 L. Ed. 419. The Government has completely failed in this respect."

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the

Mandoli case (344 U. S. 133),[5] the court said (206 F. 2d 599):

> "We can see no valid reason for making any distinction between service by conscription in the Italian Army and service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance."

In *Adams v. Maryland,* 347 U. S. 179, the United States Supreme Court affirmed, in effect, what the Court of Appeals had said in the *Lehmann* and *Perri* cases. In the *Adams* case the Supreme Court recognized that one who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U. S. at 181):

> ". . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

In *Murata v. Dulles,* 111 Fed. Supp. 306, 308 (D. C. D. Haw., 1953), the court said:

> "As a citizen of Japan, living in Japan, the plaintiff was subject to Japanese law and under compulsion to comply with Japanese law. His compliance with the conscription law of Japan did not result in a loss of United States citizenship."

Accord:

> *Okimura v. Dulles,* 111 Fed. Supp. 303, 306 (D. C. D. Haw, 1953).

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[5]With which the Supreme Court agreed: "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." (344 U. S. at 135.)

The application of these principles to the instant case when viewed against the background of wartime, totalitarian, militaristic, tyrannical Japan, would seem manifest.[6] And courts which have considered the matter in similar cases have so recognized.

In *Kanno v. Acheson,* 92 Fed. Supp. 183 (D. C. S. D. Cal. 1950), the court said:

> "For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the

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[6]We attach as an Appendix "B," comments and extracts from official and other authoritative accounts of the nature of Japan at the time here involved. These and other documents were before the trial court and are here before this Court. (See Stipulation *re* Exhibits Admitted by Reference.) As to those documents not admitted into evidence, but marked for identification, this Court can take judicial notice of the contents showing the conditions and recent history of Japan, as could the trial court. (*NLRB v. E. C. Atkins Co.,* 331 U. S. 398, 406; *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484; *Tempel v. United States,* 248 U. S. 121, 126; *Stainback v.. Mo Hock Ke Lok Po,* 336 U. S. 368, 375; page 11 of brief for Government in *Hirabayashi v. United States,* 320 U. S. 81; *Maritime Union v. Herzog,* 78 Fed. Supp. 146 (D. C. D. C. 1948), aff'd 334 U. S. 854:

> "We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 Fed. Supp. 201, 206 (D. C. S. D. Cal. 1944):

> "A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan,* 4 Wall. (U. S.) 2, 18 L. Ed. 281, 296; (that the federal authority in Indiana was

Japanese military authorities, the Secret Police and the Special Higher Police."

In *Kato v. Acheson,* 94 Fed. Supp. 415, 416 (D. C. S. D. Cal., 1950), it was said:

". . . the plaintiff, and other young American-born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Japan of being dominated by a cruel and unjust military government although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan

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always unopposed); *The Appollon,* 9 Wheat. (U. S.), 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v. Roman Catholic Church,* 210 U. S. 296, 309 (of the history of Porto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Wilcox,* 161 F. 2d 785, 787 (C. C. A. 9, 1947), cert. den. 332 U. S. 763 (military problems facing General DeWitt during the war); *Ex parte Zimmerman,* 132 F. 2d 442, 445 (C. C. A. 9, 1952), cert. den. 319 U. S. 744) (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hunter v. Wade,* 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 634, reh. den. 337 U. S. 921) (that during the war in Europe the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush,* 84 Fed. Supp. 873 (D. C. D. C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Gualtieri v. Sperry Gyroscope Co., Inc.,* 67 Fed. Supp. 219, 221 (D. C. E. D. N. Y., 1946) (of industrial condition which existed in the nation during the period immediately before the war and during the war); *Tidmore v. Mills,* 32 So. 2d 769, 777 (Court App. Ala., cert. den. 32 So. 2d 782); *Atchison, T. & S. F. R. Co. v. United States,* 284 U. S. 248, 260; *Skendzel v. Rose Manor Realty Co.,* 80 Fed. Supp. 619, 622 (D. C. E. D. Wisc., 1948); *The Pietra Campanella,* 73 Fed. Supp. 18, 27 (D. C. D. Md., 1947).

regardless of the rights of all, and it is easy to ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated."

In *Morizumi v. Atcheson,* 101 Fed. Supp. 976, 977 (D. C. N. D. Cal., 1951):

"It is clear that at the time petitioner was ordered to report for army duty in 1945, he had no reasonable choice but do so. Nor would it be reasonable to expect him to have protested, however abhorrent such service was to him. It would have required unusual courage and intense devotion to principle for anyone in petitioner's position to have protested. In view of the domination of the military over Japanese life, the gesture would undoubtedly have been futile. For petitioner to have asserted his United States citizenship as the basis for his refusal to serve, at a time when our bombing was reducing Japanese cities to rubble, would surely have resulted in the most serious consequences. In view of what is generally known of conditions in Japan, it is not likely that he would have escaped with merely a prison sentence."[7]

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[7] *Cf.*, as to a similar situation in Italy, this admission by the Attorney General (41 Ops. Atty. Genl. No. 16), quoted and adopted by the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135:

". . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all' . . ."

Accord: *Acheson v. Maenza,* 202 F. 2d 453, 459 (C. A. D. C., 1953):

". . . That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy. Surely, the outbreak of the war, with its attendant wave of emotionalism and chauvinism in Mussolini's Italy, would have rendered further opposition to military service not only futile and unavailing but exceedingly dangerous to the safety and perhaps the life of the person voicing such opposition . . ."

This court only recently, in *Fukumoto v. Dulles,* 216 F. 2d 553, recognized the nature of Japan and the compulsions exercised upon a person such as appellant here. Indeed the *Fukumoto* case is even stronger from the Government's point of view for at least two reasons: (1) The appellant there took positive steps to actually recover and again become a Japanese citizen, an act which, if voluntary and if amounting to naturalization, was expatriating under 8 U. S. C. 801(a); (2) The appellant there was under no compulsion of law.

The trial court in *Fukumoto* held as a fact that the plaintiff there had acted voluntarily. Nevertheless, this court reversed, and said (216 F. 2d at 555):

> "It is apparent the District Court had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship."

In its discussion this court recalled the situation in this country as explained in its decision in *Acheson v. Murakami,* 176 F. 2d 953, the same set of circumstances which prompted this court to rule in *McGrath v. Abo,* 186 F. 2d 766, 772, that:

> ". . . a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary."

We submit the point to be well taken that the same principles apply here as in denaturalization cases. (*Cf., Schneiderman v. United States,* 320 U. S. 118, 122; *Baumgartner v. United States,* 322 U. S. 665; *Lehmann v. Acheson,* 206 F. 2d 592, 599; *Acheson v. Maenza,* 202 F. 2d 453, 456, *Monaco v. Dulles,* 210 F. 2d 760.) However, as in *Fukumoto,* we believe that question need not be de-

cided. We submit that on the ordinary burden of proof and because of the presumption of involuntariness which the government did not rebut, judgment should have been for appellant.

There is no evidence to support the Government's contention that appellant acted voluntarily. The trial court's view [R. 84-85] that judgment must be for appellee because appellant lied at the Consulate in order to save his citizenship, and therefore he was impeached at the trial court, does not reach the issue here. Without condoning the conduct, it was about an immaterial matter and really of small import, although the court and government counsel blew it up beyond all proportion and out of perspective.

Appellant did not lie as to the acts which might lead to expatriation, military service and voting. He lied as to having voted in 1947 and 1948 [R. 51].[8] But he did not deny and frankly told the consulate that he had served in the Army [Exs. A, C, D], and that he had voted in 1946 [R. 51, 54, 56].

The misstatement by appellant at the Consulate does not erase from the case the other facts (compulsory drafting, the nature of Japan, etc.), about which there is no dispute, and which bring this case clearly within the cases discussed above.

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[8]There is some suggestion in the record [R. 83] that appellant told an "American soldier" that he had not been a member of the Kempei-tei. But of what materiality is that? He did not so lie before the Consulate nor did he present any document to the Consulate falsifying his military service.

There have been other cases where the plaintiff has lied even about the ultimate act which is expatriating under the statute, a matter of much greater consequence than here where appellant falsified not that he had not voted, but as to the number of times he had voted. But the courts have recognized the fears and pressures which a person such as appellant here undergoes at the trying time before the Consulate in his effort to return to the United States. (See, *e. g., Serizawa v. Acheson,* No. 30448 (U. S. D. C. N. D. Cal., 1953), unreported):

> "The fact that plaintiff falsely represented, in a written statement filed with the American Cunsul at Yakohama, that he had not voted in a Japanese election does not necessarily destroy his crediibility otherwise. In the light of plaintiff's testimony that he learned after he had voted that the State Department might not allow him to return to the United States because of such action on his part, it is reasonable to conclude that his fear of being prevented from returning to the United States would motivate him to hide the fact rather than to try to explain it."

Accord:

> *Yamasaki v. Dulles,* No. 1244 (U. S. D. C. D. Haw., 1953, unreported):
>
> "The defendant sought to impeach plaintiff's testimony as to his reasons for voting in the 1946 election on the basis of the false statements admittedly made by plaintiff to the Vice Consul and the election official. The fact that plaintiff made such false representations under the circumstances does not necessarily destroy his credibility otherwise. It is not unreasonable to conclude that his fear of being prevented from returning to the United States would

motivate him to hide the fact he had voted rather than try to explain it."[9]

To the same effect are:

Murata v. Acheson, 111 Fed. Supp. 306, 307 (D. C. Haw., 1953);

Hisamoto v. Dulles, No. 1318 (D. C. Haw., 1954).[10]

Moreover, appellant's misstatement as to the number of times he had voted bear, if at all, no election issue, not on the military service issue.

Furthermore, appellant's purported misstatement to the soldier (the record does not make clear what he said), as to what he had done in the army is immaterial. His entrance into the army was involuntary. Subsequent conduct could not make it voluntary.

Pandolfo v. Acheson, 202 F. 2d 38, 41 (C. A. 2, 1953).

* * * * * * * * *

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[9]*Cf.,* the testimony of appellant at the trial [R. 59]:

"I was afraid that if I would mention all the times that I voted, that I would lose my American citizenship and wouldn't be able to receive my passport, and that was the chief reason of not receiving my papers, I was afraid of that, and at that time I was so anxious to return to the United States."

[R. 83]:

"Q. Will you please tell us and tell the Court, if you can remember, why you told the American soldier that you were not a member of the Kempei tai? A. I was afraid if I admitted I was a Kempei tai, I wouldn't be able to return to the United States."

[10]And *cf., Martinez v. McGrath,* 108 Fed. Supp. 155 (U. S. D. C. D. Tex., 1952), where the plaintiff, in trying to please the consular officer said that he had voted, when actually he had not. The Court, recognizing the realities of the situation, declared plaintiff to be a citizen.

From the cases and principles discussed above the District Court's holding that appellant's service in the Army was voluntary was clearly erroneous and should be reversed. (*Cf.,* this court in *Acheson v. Murakami,* 176 F. 2d 953, 959.)

II.
The Election Issue.

We believe that the only proper ruling for this Court to make on the army issue is to reverse the trial court as was done in the *Lehmann* case and hold that appellant did not lose his United States nationality by reason of his army service. If we are wrong on this, then the election issue need not be reached at all. If we are right, then the following are our views on the election phase of the case.

The instant case comes within this court's ruling in *Takehara v. Dulles,* 205 F. 2d 560, and appellant is entitled to a reversal on the basis thereof.

We do not brief the matter more fully, however, because we suggest to the court that this issue need not be reached at this time.

Subsequent to the entry of judgment herein, Congress passed Public Law 515, 83d Congress, popularly known as the "Watkins Act." A copy of the Act is set out here as Appendix "C." Congress thus recognized the involuntary nature of the voting by Nisei such as appellant here in the elections in occupied Japan, and provided a simple

method for them to regain their citizenship, namely, the taking of an oath of allegiance.

Recognizing the wisdom of affording such persons the opportunity to obtain the benefits of the statute, this court has entered orders in at least three cases pending on appeal before it, holding in abeyance further processing of appeals until the procedures of the statute have been completed.

See:

Hori v. Dulles, No. 14458;
Owada v. Dulles, No. 14411;
Sakamoto v. Dulles, No. 14456.[11]

Accordingly, appellant suggests the following alternatives as the proper method for disposition of the election issue:

1. The court rule that the case falls within *Takehara* and that therefore appellant's voting was involuntary;

2. If the court does not agree, or feels it proper not to consider the matter at this time, the case be sent back to the District Court to permit appellant to take the oath provided in the Watkins Act. This was the procedure that the Court of Appeals for the Third Circuit adopted in *Perri v. Dulles,* 206 F. 2d 586, in connection with similar legislation in regard to voting in Italian elections. We do not believe that appellee would oppose this procedure.

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[11]In agreement with counsel on all sides, the trial courts are similarly holding in abeyance trials in election cases until the plaintiffs process their cases under the Watkins Act.

Conclusion.

On the army issue, the case should clearly be reversed. On the election issue, the case should be disposed of by one of the alternatives suggested above.

Respectfully submitted,

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APPENDIX "A."

Japanese Law.

(In evidence by reference to Exhibit 16, Mutsuye v. Dulles, No. 1232 N. D., U. S. D. C., S. D. Cal.)

CONSTITUTION OF JAPAN.

Article 20:

"A subject of Japan will obey the laws and have obligations of military service."

JAPANESE MILITARY SERVICE LAW.

Article 1:

"Male subjects of the Empire shall serve in the military service as established in this law."

AGE OF CONSCRIPTION.

Originally, the age for the conscription physical examination was 20 years as expressed in Article 23 of the Japanese Military Service Law as follows:

Article 23:

"Any person who becomes 20 years old during the time between December 1 and November 30 of the following year must take the physical examination for conscription, except those to whom special provision of this law is applied. The age stipulated in the foregoing clause is called the conscription age."

The age for the conscription physical examination was lowered to 19 by Imperial Ordinance No. 939 dated December 23, 1943.

The physical examination above referred to was given in the spring of each year. In the case of persons born

before December 2, the physical examination was given in the spring before the 19th or 20th birthday (depending upon the conscription age applicable), and in the case of persons born after December 2, the physical examination was given in the spring following the 19th or 20th birthday.

Evasion of Military Service.

Articles 74 and 75 of the Japanese Military Service Laws are as follows:

Article 74:

> "Any person who evades military service by deserting or hiding, injuring wilfully one's body, or acquiring disease and by other acts of fraud will be punished by penal servitude of three years or less."

Article 75:

> "Persons called for military service who delay entering the barracks for more than ten days, without any legitimate reason, shall be punished by imprisonment of six months or less; during wartime, when five days have elapsed, shall be punished by imprisonment of one year or less."

APPENDIX "B."

Extracts From and/or Comments on Documents Admitted Into Evidence or Marked for Identification, by Reference From Matsuye v. Dulles, No. 1232 N. D., D. C., S. D. Cal. (Exhibit Numbers Are the Numbers Given in the Matsuye Case).

SCAP, Education in the New Japan 6, 16 May, 1948 [Ex. 5 for Ident.]:

"In 1925, the Ministry of Education issued an ordinance that, at the time, caused some dissention, but that came to be accepted as an integral part of the educational program. This ordinance provided that military officers on active duty should be appointed to give military instructions in all government and public normal, middle, higher, technical and special schools. In the next 15 years, further changes designed to sharpen the educational system into an able instrument of nationalistic policy were made. Regimentation and a hierarchal centralization of power over education were intensified in 1937 and 1941. This system continued until August, 1945.

"One significant feature of the middle schools was military training which was integral and important part of the curriculum. Here the Japanese boy was subjected for the first time to fully organized military training. The War Department provided officer instructors and during the war the training occupied five hours a week. Instruction included squad drill, military evolutions, target practice, bayonet fighting, and the use of hand grenades and other implements of warfare. Toward the end of the war there was little opposition to military training in the schools, many middle school graduates being drafted directly from their schools into the army, while a sub-

stantial number of others went to training schools for junior officers.

"For a long time the average citizen's reaction to the police has been one of extreme fear." [SCAP, Summation, No. 3, Dec. 1945; Ex. 4 for Iden.]

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant role in the government and have exercised almost complete control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempeitai) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactments on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of democratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." [SCAP, Summation No. 1, Sept., Oct. 1946, pp. 36-37; Ex. 2, for Ident.]

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergence of authentic democratic groups." (*Ibid.*, 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials." (*Ibid.*, 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, consorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.,* 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." [SCAP, *Two Years of Occupation,* p. 14; Ex. 10, for Ident.]

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, prefectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." [SCAP, *A Brief Progress Report on the Political Reorientation of Japan,* p. 7; Ex. 10, for Ident.]

"The great masses of the people, docile by training and terrorized by fear, were without a voice in the determination of their own affairs." [SCAP, *Two Years of Occupation,* pp. 13-15; Ex. 10, for Ident.]

"(Nisei, whether in Japan a long or short time) were under surveillance (by the police) by reason of their identity and association." [Togosaki Deposition, p. 10; Ex. 13 in Evidence.]

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.*, p. 26.)

"There was fear . . . among (the draftees) that . . . they would be shot or killed . . . if they didn't obey summons." (*Ibid.*, p. 27.)

The Murayama Deposition was also admitted into evidence [Ex. 14]. This court commented on several features from it in *Fukumoto v. Dulles,* 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. [Matsuki Deposition, pp. 15, 17; Ex. 15 in Evidence.] One couldn't refuse conscription. (*Ibid.*, pp. 18, 21.)

APPENDIX "C."

Public Law 515, 83rd Congress, Chapter 553, S. 1303, 66 Stat. 240.

AN ACT.

To provide for the expeditious naturalization of former citizens of the United States who have lost United States citizenship by voting in a political election or plebiscite held in occupied Japan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a person who has lost United States citizenship solely by reason of having voted in any political election or plebiscite held in Japan between September 2, 1945, and April 27, 1952, inclusive, and who has not, subsequent to such voting, committed any act which, had he remained a citizen, would have operated to expatriate him, and is not otherwise disqualified from becoming a citizen by reason of sections 313 or 314, or the third sentence of section 318 of the Immigration and Nationality Act, may be naturalized by taking, prior to two years after the date of the enactment of this Act, before any naturalization court specified in subsection (a) of section 310 of the Immigration and Nationality Act or before any diplomatic or consular officer of the United States abroad, the applicable oath prescribed by section 337 of such Act. Certified copies of such oath shall be sent by such court or such diplomatic or consular officer to the Department of State and to the Department of Justice. Such oath of allegiance shall be entered in the records of the appropriate naturalization court, embassy, legation, or consluate, and upon demand, a certified copy of the proceedings, including a copy of the oath administered, under the seal of the natur-

alization court, embassy, legation, or consulate, shall be delivered to such person at a cost not exceeding $5, which certified copy shall be evidence of the facts stated therein before any court of record or judicial tribunal and in any department or agency of the Government of the United States. Any such person shall have, from and after naturalization under this Act, the same citizenship status as that which existed immediately prior to its loss: Provided, That no such person shall be eligible to take the oath prescribed by section 337 of the Immigration and Nationality Act, unless he shall first take an oath before any naturalization court specified in subsection (a) of section 310 of the Immigration and Nationality Act, or before any diplomatic or consular officer of the United States abroad, that he has done nothing to promote the cause of communism. Naturalization procured under this Act shall be subject to revocation as provided in section 340 of the Immigration and Nationality Act, and subsection (f) of that section shall apply to any person claiming United States citizenship through the naturalization of an individual under this Act.

Approved July 20, 1954.